No. 89-5867

Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

JON R. KER*
(Appointed by this Court)
P. O. Box 1087
Hewitt, Texas 76643

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Baylor University Law School
Baylor University
Waco, Texas
(817) 666-1122

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Petition For Certiorari Filed October 10, 1989
Certiorari Granted February 20, 1990

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RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT

5/6/87	1	Complaint filed
7/22/87	6	Response by Shirley W. Irwin to motion to dismiss
7/28/87	7	Amended complaint by Shirley W. Irwin against USA (Veteran's Administration), Irvin D. Noll, Robert L. Cimber, Charles Stenslie, and James Strong amending complaint
7/28/87	8	Demand for jury trial by Shirley W. Irwin
8/14/87	11	Order that each party offer any proof it has within ten (10) days on the issue of the date of receipt of Plaintiff's "right to sue letter" from the EEOC
8/26/87	12	Response by Shirley W. Irwin to order
5/12/88	29	Motion by Shirley M. Irwin for reconsideration of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In Employment Act of 1978
5/13/88	30	Brief by Shirley W. Irwin in support of motion for reconsideration of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In Employment Act of 1978
8/15/88	37	Response by Shirley W. Irwin to Defendants' motion for reconsideration
8/15/88	38	Amended motion for reconsideration of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In

		Employment Act of 1978 [29-1] for reconsideration "amended" by Shirley W. Irwin
9/14/88	40	Order denying amended motion for reconsideration [38-1], granting motion for reconsideration [33-1], of the Court's Order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination In Employment Act of 1978 [29-1], and the Plaintiff's remaining claims under the First and Fifth Amendments and under 29:791 ET SEQ. are dismissed
9/14/88	41	Judgment for USA, Irvin D. Noll, Robert L. Cimber, Charles Stenslie, James Strong against Shirley W. Irwin; ordered, adjudged, and decreed that this cause of action is dismissed; costs of court are to be borne by the party incurring same
9/14/88	–	Case dismissed
9/26/88	42	Notice of appeal by Shirley W. Irwin
9/11/89	43	Certified copy of judgment of USCA affirming district court's ruling and dismissing appeal

U.S. COURT OF APPEALS

9-26-88	Notice of Appeal filed in District Court
4-5-89	Oral Argument
6-13-89	Decision entered
6-26-89	Appellant's Petition for Rehearing filed
7-13-89	Order Denying Appellant's Petition for Rehearing

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

Shirley W. Irwin, Appellant,	)	
v.	)	Appeal No. 01863333
Veterans Administration, Agency.	)	

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination, in violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791 *et seq*. The agency decision is dated September 4, 1986. The appeal was postmarked September 4, 1986. Accordingly, the appeal is timely (*see* 29 C.F.R. §1613.233(a)), and is accepted in accordance with EEOC Order No. 960, as amended.

The agency rejected appellant's complaint on the grounds that appellant failed to seek EEO counseling in a timely fashion.

A review of the record reveals that appellant alleges that he was discriminated against on April 17, 1986.

EEOC Regulation 29 C.F.R. §1613.214(a)(1)(i) requires that complaints of discrimination be brought to the attention of the Equal Employment Opportunity Counselor within

thirty (30) days of the date of the matter causing appellant to believe he was discriminated against, or if a personnel action, within 30 calendar days of its effective date. Here, the record reflects that appellant first sought EEO counseling with respect to the rejected allegations on June 12, 1986. Appellant failed to submit adequate justification, pursuant to 29 C.F.R. §1613.214(a)(4), for extending the time limitation beyond thirty days. Accordingly, the agency's decision to reject appellant's complaint as untimely was proper and is AFFIRMED. 29 C.F.R. §1613.215.

A statement of appellant's rights (R-1) is attached to this decision.

FOR THE COMMISSION:

19 MAR 1987
DATE

/s/ Dolores L. Rozzi, Director
Dolores L. Rozzi, Director
Office of Review and Appeals

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

NOTICE OF RIGHT TO FILE A CIVIL ACTION

You are hereby notified that the attached decision in your case is final. You have the right to file a civil action in the appropriate United States District Court *WITHIN THIRTY (30) DAYS* from the date that you receive this decision. If any of your claims were based on the Age Discrimination

in Employment Act of 1967 (29 U.S.C. §633a), *AS TO THOSE CLAIMS ONLY*, you *MAY* have up to six years after the right of action first accrued in which to file a civil action. *See Lehman v. Nakshian*, 453 U.S. 156 (1981); 29 U.S.C. §633a(f); and 28 U.S.C. §2401(a). You are further notified that if you file a civil action, *YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT.* Rule 25(d)(2) of the Federal Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or are unable to obtain the services of an attorney to act on your behalf, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended, and the Rehabilitation Act of 1973, 29 U.S.C. §§791 and 794c, as amended, you may request that the Court appoint an attorney to represent you and may also permit you to file the civil action without payment of fees, costs, or security. If you want to request appointment of an attorney, your request must be

FILED WITH THE COURT WITHIN THIRTY (30) DAYS from the date that you receive the Commission's decision.

NOTICE OF RIGHT TO REQUEST REOPENING

The Commissioners may, in their discretion, reopen and reconsider the decision in your case if you submit a written request and argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

AGENCY REQUESTS AND ANY SUPPORTING ARGUMENTS, must be submitted within the 30 day time frame for filing a request to reopen. *ALL REQUESTS* must be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900 Falls Church, Virginia 22041.

FILING A REQUEST TO REOPEN WITH THE COMMISSION MAY NOT EXTEND THE TIME PERIOD ALLOWED FOR FILING A CIVIL ACTION. IF YOU WISH TO PRESERVE YOUR RIGHT TO FILE A CIVIL ACTION, THE CIVIL ACTION SHOULD BE FILED WITHIN THE

TIME ALLOWED, EVEN IF YOU DECIDE TO REQUEST REOPENING BY THE COMMISSION.

/s/ Dolores L. Rozzi, Director
Dolores L. Rozzi, Director
Office of Review and Appeals

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF REVIEW AND APPEALS
5203 LEESBURG PIKE, SUITE 900
FALLS CHURCH, VIRGINIA 22041

OFFICIAL BUSINESS
Penalty for private use $300

P 421 670 532

POSTAGE AND FEES
Equal Employment Opportunit

HOLD

DATE
3-24-87
1ST NOTICE
MAY 1987
2ND NOTICE
4-7
RETURN

Detached from
PS Form 3849-A
Oct. 1980

Shirley W. Irwin
600 Maxfield
Waco, TX 76705

ORW 00 09211611 03/21/87
NOTIFY SENDER OF NEW ADDRESS
ORWIN
RT 6'BOX 1458
WACO TX 76706-9705

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

SHIRLEY W. IRWIN, Plaintiff, v. VETERANS ADMINISTRATION, an official agency or Department of the United States of America, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, and JAMES STRONG, Individuals, Defendants.	§ § § § § § § § § § § § §	CIVIL ACTION NO. W-87-CA-104

ORDER

On this date came on to be considered the motion of the Defendants to dismiss. Defendants take the position that as to the Title VII claims, Plaintiff did not bring suit within thirty (30) days of her receipt of the "right to sue letter" from the Equal Employment Opportunity Commission. Defendants base this assertion on the fact that the Equal Employment Opportunity Commission rendered its decision March 19, 1987; that a copy of this decision was received by Defendants' General Counsel on March 21, 1987; and that Plaintiff did not file suit until May 6, 1987.

Plaintiff responds by stating that the complaint was filed within thirty (30) days of receipt by Plaintiff, but neither offers proof nor even states the date of receipt.

This issue could dispose of Plaintiff's Title VII claims. Accordingly, it is

ORDERED that each party shall offer any proof it has on this issue within ten (10) days.

SIGNED this 14th day of August, 1987.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

(Filed August 26, 1987)

PLAINTIFF'S RESPONSE TO COURT REQUEST

COMES NOW the Plaintiff, Shirley W. Irwin, in reply to the Order of the Court for information respecting Plaintiffs' receipt of notice of the determination by the Equal Employment Opportunity Commission herein, Plaintiff would respectfully show unto the Court as follows:

1. Plaintiff attaches hereto his affidavit indicating the date of Plaintiffs' receipt of the determination by the EEOC.

2. Plaintiff attempted to file the herein affidavit on Monday, August 24, 1987 but was not accepted by the Clerk for filing.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully submits Plaintiffs affidavit in explanation of his receipt of the determination by the EEOC.

DATED this the 25th day of August, 1987.

RESPECTFULLY SUBMITTED:

/s/ Jon R. Ker,
JON R. KER, ATTORNEY
AT LAW
STATE BAR OF TEXAS NO.
11327700
P.O. BOX 1087
HEWITT, TEXAS 76643
817-666-1122

(Certificate of Service
omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption, omitted in printing)

AFFIDAVIT

SHIRLEY W. IRWIN, of lawful age, being first duly sworn upon oath states as follows:

1. My name is SHIRLEY W. IRWIN and I am the plaintiff in the above entitled and numbered cause.

2. I received the decision of the Equal Employment Opportunity Commission by certified mail on or about the 7th day of April, 1987.

3. This affidavit is given in response to the order of the Court dated August 14, 1987, as proof of when I actually received the decision of the Equal Employment Opportunity Commission.

FURTHER AFFIANT SAITH NAUGHT.

Dated this 20 day of August, 1987.

/s/ Shirley W. Irwin
Shirley W. Irwin
Affiant

STATE OF TEXAS)
)
COUNTY OF MCLENNAN)

SUBSCRIBED AND SWORN TO BEFORE ME by the said Shirley W. Irwin on this 21st day of August, 1987.

/s/ Terri Anderson
NOTARY PUBLIC
IN AND FOR
THE STATE OF TEXAS

TERRI ANDERSON
Notary Public, State of Texas
My Commission Expires 10-11-87

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

ORDER

On this date came on to be considered Defendant's Amended Motion to Dismiss. Plaintiff, Shirley W. Irwin, filed his complaint on May 6, 1987 naming as Defendants, the Veteran's Administration, an agency of the United States and Irvin D. Noll, Robert L. Cimber, and Charles Stenslie in their individual capacities. In his original complaint, Plaintiff alleges Defendant Veteran's Administration discriminated against him because of his race, age and handicap constituting violations of 42 U.S.C. § 2000e, 29 U.S.C. §§ 621 *et seq.*, and 29 U.S.C. §§ 791 *et seq.*, respectively, as well as violations under the First and Fifth Amendments to the United States Constitution. Plaintiff also alleges that the four individual Defendants "acting in concert, conspired to deprive Plaintiff of equal protection of the laws, or of equal privileges and immunities under the laws," which constitute violations of 42 U.S.C. §§ 1985 and 1986.

The United States filed a Motion to Dismiss Plaintiff's original complaint on July 10, 1987. Plaintiff filed a Reply to Defendant's Motion to Dismiss on July 22, 1987 and then filed an Amended Complaint on July 28, 1987. In that amended complaint Plaintiff added Defendant James Strong and expanded his complaint to allege age discrimination under 29 U.S.C. §§ 631 and 633a and violations of the merit system principles under 5 U.S.C. §§ 2301 and 2302. The relief requested from the above

alleged violations is an injunction, reinstatement and damages totalling $200,000 plus $500,000 in exemplary damages for the evil intent of the Defendants' "to harm the Plaintiff and deprive [him] of his rights, privileges and immunities under the law. . . . "

I.

Claims under 42 U.S.C. §§ 1985 and 1986

42 U.S.C. § 2000e-16(a)-(c) which is the jurisdictional statute of Title VII of the Civil Rights Act of 1964 provides the exclusive remedy for discrimination in federal employment in a cause of action against the United States. *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976); *see also, Henderson v. United States Veterans Administration*, 790 F.2d 436 (5th Cir. 1986); *Newbold v. United States Postal Service*, 614 F.2d 46 (5th Cir. 1980). In *Newbold*, the plaintiff filed a suit, similar to this one, against the United States Postal Service as well as against four individual defendants. In applying the rule of *Brown* to the causes of action against the individuals, the Court stated:

> There was no union or individual defendant in *Brown*, so it does not squarely control with respect to suits under §§ 1981, 1983, 1985 or 1986. . . . However, the *Brown* court's broad language on preemption and exclusivity suggests there is no cause of action against individuals under § 1981 *et seq. See Gissen v. Tackman*, 537 F.2d 784, 786 (3rd Cir. 1976) (en banc).

In another case similar to the one at hand, *Polisoto v. Weinberger*, 638 F. Supp. 1353 (W.D. Tex. 1986), the District Court dismissed the plaintiff's claims of conspiracy to

deprive her of her constitutional rights under 42 U.S.C. §§ 1985 and 1986. Plaintiff attempted "to get around the clear dictates of the Supreme Court in *Brown*," but to no avail. The Court dismissed the claims under Sections 1985 and 1986 stating that any claims of discrimination are only cognizable under Title VII. *Id.* at 1369.

Here, Plaintiff asserts the four individual Defendants acted in concert with the Veterans Administration to discriminate against Plaintiff "on basis [sic] of age and physical handicaps, as well as retaliate [sic]. . . . " Plaintiff's Complaint ¶¶ 19, 23 and 32. Plaintiff also claims that each of the Defendants possessed "the power to prevent or aid in preventing the commission of said wrongs but neglected or refused to do so." Plaintiff's Complaint ¶ 27. Plaintiff in *Polisoto* made a similar claim of neglect and the Court dismissed this claim as a "novel attempt" to recharacterize her Sections 1985 and 1986 claims, [and] it is clear to the court that to prove these claims, plaintiff must also prove "discrimination and her claims were dismissed." *Polisoto*, 638 F. Supp. at 1369. Similarly, because discrimination claims in federal employment are only cognizable under Title VII, Plaintiff's claims against the Veterans Administration and the four individual defendants under 42 U.S.C. §§ 1985 and 1986 must be dismissed.

II.

Claims under Title VII of the Civil Rights Act of 1964

In a Title VII cause of action against the federal government, the Plaintiff must bring suit under 42 U.S.C. § 2000e-16. This is a jurisdictional statute which governs

complaints by a federal employee of discrimination based on race, color, religion, sex or national origin while employed by the federal government. 42 U.S.C. § 2000e-16(a). Because Plaintiff is suing the Veteran's Administration, an official agency of the United States, jurisdiction under 42 U.S.C. § 2000e-16 is proper. However, jurisdiction is not automatic upon pleading 42 U.S.C. § 2000e-16. The Plaintiff must comply with the notice requirements of this statute.

Section 2000e-16(c) provides that Plaintiff must file his claim initially with the Equal Employment Opportunity Commission [hereinafter EEOC], and if the situation cannot be resolved by the EEOC, the Plaintiff may file a civil action but only after receipt of notice of final action taken by the EEOC. Once that notice is received, Plaintiff must file his suit within thirty (30) days of the receipt of notice from the EEOC. 42 U.S.C. § 2000e-16(c). Defendants allege in this case that Plaintiff Irwin *did not* file his civil action within thirty days of his receipt of notice, and consequently urge his Title VII claims be dismissed.

Defendants initially contended that Plaintiff's cause of action was untimely in Defendant's Motion to Dismiss filed on July 10, 1987. Plaintiff responded stating that he did, in fact, file his action within thirty (30) days of the date of receipt of the EEOC's decision. Because neither party provided any proof as to when exactly notice was received, the Court requested such proof on August 14, 1987. In response to the Court Order, Plaintiff filed an affidavit merely stating that the Plaintiff personally received the decision of the EEOC by certified mail "on or about the 7th day of April, 1987" with absolutely no

supporting evidence. Defendants, on the other hand, provide a copy in the Defendants' Amended Motion to Dismiss of the return receipt. This receipt show [sic] that Margaret Riviera signed for Plaintiff's attorney, Jon R. Ker, on March 23, 1987. *See* Exhibit C to Defendant's Amended Motion to Dismiss. Mr. Ker filed suit on behalf of Plaintiff forty-four (44) days later on May 6, 1987, and it is uncontroverted that he has represented Plaintiff throughout this litigation. Plaintiff cursorily states in Plaintiff's Reply to the Amended Motion to Dismiss that "by way of previous filings," Plaintiff has shown that the herein action was initiated within thirty (30) days of receipt of notice, but the Court is not aware of any previous filings other than the above-mentioned affidavit that offers any proof as to actual date of receipt of notice. Therefore, the question is whether receipt by Plaintiff's attorney before the alleged receipt by the Plaintiff begins the running of the 30-day period, if so, Plaintiff's claim under Title VII is barred.

The Fifth Circuit addressed the issue of whether or not notice to a person's attorney constitutes notice to the person in *Decker v. Anheuser-Busch*, 632 F.2d 1221 (1980), *vacated and remanded*, 670 F.2d 506 (5th Cir. 1982) (en banc) (to elicit additional evidence as to whether an attorney-client relationship actually existed) and concludes that "there is noting new, novel or unique" about this concept. *Id.* at 1223; *see also Cooper v. Lewis*, 644 F.2d 1077, 1082 (5th Cir. 1981); *Huckeby v. Frozen Food Express*, 555 F.2d 544-45 (5th Cir. 1977) (dictum). The Court also states that "notice is effective from the time of its delivery to the attorney's office." *Id.* at 1224. It is true that statutory right-to-sue notice in *Decker* is not the same statutory notice at hand.

The *Decker* notice was required under 42 U.S.C. § 5(f)(1) which allows civil actions under Title VII. Yet, the 30-day requirement of Section 2000e-16(c) is discussed in *Polisoto v. Weinberger*, 638 F. Supp. 1353. The Plaintiff in *Polisoto* is charged with constructive knowledge of the EEOC's decision on the date her attorney of record personally acknowledged receipt of the decision. The *Polisoto* Court embraces the decision and policy of *Decker* and dismisses the Title VII claim in its entirety because of the failure to comply with 42 U.S.C. 2000e-16(c). *Id.* at 1363.

Since Plaintiff has not controverted the proof that shows his attorney received notice forty-four (44) days before suit was filed, and there is no doubt as to whether the attorney-client relationship remains intact, the logic of *Polisoto* and *Decker* is persuasive. The *Decker* court states, and this Court agrees, that:

> Involved here are the professional responsibilities of the attorney and a long standing tradition that notice to or knowledge by the attorney is notice to or knowledge by the client. Unless and until there is a clear expression by the Congress to the contrary, these professional responsibilities and this long standing tradition, must prevail. . . .

Decker, 632 F.2d at 1224.

Therefore, Plaintiff's failure to comply with 42 U.S.C. Section 2000e-16(c) 30-day filing period deprives this Court of subject matter jurisdiction, and Plaintiff's Title VII claim must be dismissed.

III.

Claims under Age Discrimination in Employment Act of 1978 (ADEA)

An employee who believes that he has been discriminated against because of his age has two avenues of relief. First, he may file a complaint with the EEOC and pursue an administrative remedy. If denied relief by the EEOC, he may then file a civil action. *See* 29 U.S.C. §§ 633a(c), (d). Second, in lieu of pursuing administrative relief, the employee may proceed directly to federal court providing he initiates the civil action no later than 180 days from unlawful action and notice of intent to sue is given to the EEOC within thirty days prior to commencing suit. *See 29 U.S.C. 633a(d); Ray v. Nimmo,* 704 F.2d 1480, 1483 (11th Cir. 1983); *Castro v. United States,* 775 F.2d 399 (1st Cir. 1985).

In this case, Plaintiff commenced an action under the ADEA without filing a formal complaint of age discrimination or notice of intent to sue with the EEOC. There is no indication on the EEOC Counseling Report provided by the Defendant in their Amended Motion to Dismiss of any complaint of age discrimination. Plaintiff urges that just because "the EEOC in its decision did not directly address Plaintiff's age discrimination claim, [sic] is not binding, or should not be found to be binding upon the Plaintiff at this time." Plaintiff's Reply to Defendant's Amended Motion to Dismiss, at 2. Yet the Plaintiff provides no authority to back up his assertion that absence of notice is not binding, and he provides no reason why he is justified in not giving notice. *See e.g. Paterson v. Weinberger,* 644 F.2d 521, 524 (5th Cir. 1981) (case remanded to allow Plaintiff to prove the reasons he was

prevented from proceeding can be blamed on employing agency). Because Plaintiff did not comply with the requirements of Section 633a(d) for initiating a civil action under the ADEA, his claims under the ADEA are dismissed.

IV.

Claims under 5 U.S.C. §§ 2301 and 2301 [sic]

5 U.S.C. Sections 2301 and 2302 set out the merit system principles of the federal government. Both parties agree that Plaintiff has no private right of action under these statutes. Therefore, the claims alleged under 5 U.S.C. Sections 2301 and 2302 are dismissed.

The remaining claims alleged by the Plaintiff that are not subject to dismissal are those under 29 U.S.C. §§ 791 *et seq.* and the First and Fifth Amendments.

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss Plaintiff's claims under 42 U.S.C. §§ 1985, 1986 and 2000e, 29 U.S.C. §§ 631 and 633a, 5 U.S.C. §§ 2301 and 2302 is GRANTED and said claims be and hereby are DISMISSED.

SIGNED this 21st day of April, 1988.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

(Filed May 12, 1988)

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DISMISSING PLAINTIFF'S CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1978

COMES NOW the Plaintiff, SHIRLEY W. IRWIN, and respectfully requests this Court reconsider its order dismissing Plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e-16, claims under the Age Discrimination in Employment Act of 1978, 29 U.S.C., Section 791 and for good cause would show unto the Court the following:

I.

On April 21, 1988, this Court entered its order which, in part, dismissed Plaintiff's claims against the Defendant, Veteran's Administration, on the basis of lack of subject matter jurisdiction. Citing that Plaintiff's complaint was not filed within thirty (30) days after date of receipt of the EEOC's decision, and finding that the date of receipt of the decision was March 23, 1987, when a return receipt was signed by Margaret Rivera for Plaintiff's attorney, JON R. KER.

II.

Plaintiff hereby submits the affidavit of JON R. KER indicating that he was outside of the United States of

America with his United States Army Reserve Unit for training in the Republic of Korea from the period March 22, 1987 through August 8, 1987. As stated in the affidavit of SHIRLEY W. IRWIN, filed commensurate with Plaintiff's Response to Court Request on August 27, 1987, notice was received by Plaintiff, SHIRLEY W. IRWIN, on or about April 7, 1987. The Plaintiff, SHIRLEY W. IRWIN, believes that actual date to be April 7, 1987; however, the green return receipt card would have been returned to the Defendant or to control to Defendant, and Plaintiff cannot state a date more accurately than as stated in his affidavit.

Because Plaintiff's attorney was out of the country at the time the return receipt signed for him by Margaret Rivera on March 23, 1987, notice was not perfected to Plaintiff until actually received by Plaintiff on April 7, 1987. Therefore, the filing of Plaintiff's complaint is within the 30-day time period and jurisdiction was satisfied.

III.

Since Plaintiff's complaint was filed within 30 days of the date of actual receipt by Plaintiff and within 30 days of actual receipt by Plaintiff's attorney, albeit Margaret Rivera signed at an earlier date on behalf of said attorney, Plaintiff's complaint is timely filed and the jurisdiction of this court is satisfied, and this Court should reconsider its decision of its order dated April 21, 1988, as the same respects paragraph II, Claims Under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, and reinstate Plaintiff's claims thereunder.

IV.

Plaintiff submits his brief in support of this motion and affidavits and exhibits for the Court's consideration.

WHEREFORE, premises considered, SHIRLEY W. IRWIN respectfully prays this Court reconsider its order of April 21, 1988, respecting the dismissal of Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, reinstate Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, or, in the alternative, conduct and [sic] evidentiary hearing for the purposes of establishing the jurisdiction of this Court with respect to these claims.

RESPECTFULLY SUBMITTED:

/s/ Jon R. Ker
JON R. KER,
ATTORNEY AT LAW

DEPARTMENT OF THE ARMY
HEADQUARTERS, 86TH U.S. ARMY
RESERVE COMMAND
7402 W. ROOSEVELT RD.

AFKE-AC-IL-AG FOREST PARK, IL 60130-2587

ORDERS 117-052 16 MAR 87

KER, JON R. 460-72-6791 CPT
ROUTE 1, BOX 270 CO A 2/12 (214) [WTPQA4]
LORENA, TX 76655 FT WORTH, TX 76107

YOU ARE ORDERED TO ANNUAL TRAINING [AT] FOR THE PERIOD INDICATED. UPON COMPLETION OF THE PERIOD OF AT, UNLESS SOONER RELIEVED OR EXTENDED BY PROPER AUTHORITY, YOU WILL RETURN TO THE PLACE WHERE YOU ENTERED AT AND BE RELIEVED FROM SUCH DUTY.

PERIOD: 26 DAYS PLUS ALLOWABLE TRAVEL TIME.
REPORT TO: OKLAHOMA CITY, OK
REPORTING TIME/DATE: NLT 0600 HOURS, 87/03/23
ATTACHED TO: 213 CO A 2/12TH SFGA
PURPOSE: ATTEND ALT AT TNG 87 TEAM SPIRIT

ADD'L INSTRUCTIONS: DA FORM 3298 RECERTIFIED 870112
SEE REVERSE – INCORPORATED BY REFERENCE

NOTES 1, 2, 3, 7, AND 14 APPLY. APPROVAL DATE FOR EXTEEDED [sic] AT 13 MAR87
TIME 0930 HRS. W/FURTHER TVL TO FT LEWIS, WA & REPUBLIC OF KOREA

FOR ARMY USE
AUTH: 10 USC 270[A][1]
HOR: SAME AS SNL

ACCT CLASS	FY 87 AT							OBLIGATION
PAY	2172070	76-2005	P3411.4	1198	S47018	ZFGG	$	2,280
O PAY	2172070	76-2005	P3411.4	1199	S47018	ZFGG	$	403
FICA	2172070	76-2005	P3411.4	1250	S47018	ZFGG	$	163
P/D	2172070	76-2005	P3411.4	211C	S47018	ZFGG	$	46
TVL	2172070	76-2005	P3411.4	219C	S47018	ZFGG	$	393
HHG	2172070	76-2005	P3411.4	2233	S47018	ZFGG	$	0
						RPA TOTAL:	$	3,285

PERFORMANCE FACTORS:			PART	MDS	UUC	UAFIC
			1	26	FB3	Z
PPN	: NA	AT	TRNG DAYS: O PEBD			: 67/02/06
COMP	: USAR	SPEC	TRNG DAYS: O SEC CL			: S
FORMAT	: 260	SCHL	TRNG DAYS: O PX/COMM AGENT			: TERRI/WIFE

FOR THE COMMANDER:

OFFICIAL
86TH USARCOM

RICHARD L. SWANSON
CW2, USA
ASSISTANT AG

DISTRIBUTION:
1-CDR, FT MCCOY,
ATTN:AFZR-CMF
5-INDIVIDUAL
7-UNIT OF ASSIGNMENT
1-DCSRM, HQ, 86TH USARCOM
1-DCSRM, HQ, 86TH USARCOM

1-APC FUND MGR Z – ANN TNG
PROGRAM CODE: 01AEZE

AFFIDAVIT OF JON R. KER

THE STATE OF TEXAS
COUNTY OF MCLENNAN

BEFORE ME, the undersigned authority, a Notary Public, on this day personal appeared JON R. KER, known to me to be the person whose signature is hereto affixed, and after being duly sworn, on oath deposed and said:

"My name is Jon R. Ker, I am the attorney of record in the foregoing entitled and numbered cause.

2. Affiant, at times relevant hereto, was the commanding officer of detachment A-214, Company A, 2d Battalion, Twelfth Special Forces Group Airborne, and was a participant in the joint services exercise Team Spirit '87 in the Republic of Korea. For purposes of attendance at the said exercise, Affiant departed Waco, Texas on March 22, 1987, and returned April 8, 1987. Affiant suffered a broken ankle during the conduct of such exercise,

which required him to report to Darnall Army Hospital, Ft. Hood, Texas, on April 9, 1987.

3. Affiant was not present in his office until April 10, 1987, and was not actually aware and could not have been made actually aware of the receipt by Margaret Rivera of the notice from the EEOC until April 10, 1987.

4. To the best information and belief of Affiant receipt by Plaintiff, Shirley W. Irwin of the Notice of Right to Sue from the EEOC was on or about April 7, 1987, and Affiant was made aware of this fact after his return to his office on or about April 10, 1987."

Further Affiant saith not.

/s/ Jon R. Ker
JON R. KER

SUBSCRIBED AND SWORN TO before me by the said JON R. KER on this 12th day of May, 1988.

/s/ Janice Stewart
NOTARY PUBLIC,
STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

ORDER

Came on this date to be considered the matter of pending motions filed in the above-styled and numbered cause. Having carefully reviewed these motions, the Court makes the following disposition.

As to Plaintiff's motion and amended motion for reconsideration of the court's Order dismissing the Plaintiff's claims under Title VII of the Civil Rights Act of 1964 and Age Discrimination in Employment Act of 1978, the Court finds that such motion lacks merit and should be denied.

The thirty-day filing provision provided by 42 U.S.C. § 2000e-16 is jurisdictional in nature and subject to strict compliance. *Eastland v. Tennessee Valley Authority,* 553 F.2d 364 (5th Cir. 1977), *cert. denied* 464 U.S. 1066 (1984). Plaintiff has presented no evidence which would constitute an excuse from compliance with the thirty-day provision. *Ringgold v. National Maintenance Corp.,* 796 F.2d 769 (5th Cir. 1986).

As to Defendant's motion for reconsideration of this Court's order, the Court finds that such motion is meritorious and should be granted.

The existence of a congressionally provided "meaningful alternative remedy" is a special factor "counselling hesitation" in allowing the recovery of damages by a

federal employee for an alleged violation of his constitutional rights. *Heaney v. United States*, 756 F.2d 1215 (5th Cir. 1985). The Plaintiff's remedy must rest upon those schemes provided by statute.

29 U.S.C. § 794 provides a party with a private cause of action for discrimination due to a handicap. Section 794a sets out the applicable remedies, procedures and rights. In implementing this section, Congress promulgated 29 C.F.R. § 1613.708, which provides that regulations regarding the processing of complaints of discrimination based on a physical or mental handicap should comply with those provisions in 29 C.F.R. §§ 1613.213-1613.643 and 1613.601-1613.643. 29 C.F.R. § 1613.281 outlines the procedure an employee must follow before initiating a civil action in a United States district court including filing suit within thirty days after a final ruling by the Equal Employment Opportunity Commission.

29 U.S.C. § 794a further provides that the procedures in 42 U.S.C. 2000e-16 shall be available in an action based on discrimination due to physical or mental handicap. The thirty-day requirement regarding the Title VII claims applies equally to a claim based on discrimination due to a physical or mental handicap. As previously noted, Plaintiff has raised no issue which would justify excusing compliance with this thirty-day provision.

IT IS, THEREFORE, ORDERED that the Plaintiff's motion for reconsideration be and is hereby **DENIED.**

IT IS FURTHER ORDERED that the Defendant's motion for reconsideration be **GRANTED,** and that the Plaintiff's remaining claims under the First and Fifth

Amendments and under 29 U.S.C. §§ 791 *et seq.* be dismissed.

SIGNED this 13th day of September, 1988.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

(Caption omitted in printing)

JUDGMENT

In accordance with the Order of this Court entered in the above-styled and numbered cause, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED and **DECREED** that this cause of action be and is hereby **DISMISSED.**

Cost of court are to be borne by the party incurring same.

SIGNED this 13th day of September, 1988.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT
JUDGE

United States Court of Appeals,
Fifth Circuit.

June 13, 1989.

Shirley W. IRWIN, Plaintiff-Appellant,

v.

VETERANS ADMINISTRATION, et al.,

Defendants-Appellees.

No. 88-1736.

Appeal from the United States District Court for the Western District of Texas.

Before ALDISERT,* REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Veterans Administration Medical Center in Waco, Texas on April 17, 1986 fired Irwin, an employee. He contacted an Equal Employment Opportunity Counselor on June 12, 1986, and later filed a complaint with the Veterans Administration. The VA rejected Irwin's claim on the ground that he failed to contact an EEO Counselor within thirty days of the alleged discrimination.[1] Irwin appealed to the Equal Employment Opportunity Commission, which affirmed the VA's decision.

Notice of the EEOC decision was delivered to the office of Irwin's attorney, and an employee of the attorney signed a receipt for the letter on March 23, 1987. At the time, the attorney was in Korea with his United States

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* Circuit Judge of the Third Circuit, sitting by designation.

[1] *See* 29 C.F.R. § 1613.214(a)(1)(i).

Army Reserve unit. Irwin claims that he received notice of the EEOC decision on April 7, and the attorney asserts that he first actually learned of the decision on April 10. Irwin filed this suit on May 6. The district court dismissed Irwin's complaint, and this appeal ensued.

I

We are asked to identify the triggering event which starts the thirty-day time clock for filing a Title VII employment discrimination complaint against the federal government. The statute is of little assistance, providing only that a civil action may be filed "[w]ithin thirty days of receipt of notice of final action taken" by the employing agency or by the EEOC on the employee or applicant's administrative complaint.[2] But the statute does not define "receipt." The EEOC regulations are no more specific.[3] Though requiring the EEOC or employing agency to "notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing,[4] the regulations take no position on the crucial question of whether receipt of a right-to-sue letter by an employee's attorney is notice to the employee of the administrative decision. The government suggests that the triggering event for the thirty-day time period is receipt of the EEOC right-to-sue letter by the claimant or by the office of the claimant's attorney, whichever occurs first. The district court agreed, finding it lacked jurisdiction over

[2] 42 U.S.C. § 2000e-16(c).

[3] *See* 29 C.F.R. § 1613.281-.282.

[4] 29 C.F.R. § 1613.282.

Irwin's Title VII claim because the complaint was filed more than thirty days after the right-to-sue letter arrived at Irwin's attorney's office. Irwin argues that the thirty-day period should not begin running until the claimant receives actual notice of his right to sue, or at least until the attorney has actual notice.

Our analysis begins with *Ringgold v. National Maintenance Corp.*[5] *Ringgold* involved a Title VII action against a private employer, with a ninety-day period for filing suit.[6] In that case, the attorney who filed Ringgold's administrative complaint subsequently left her two-attorney partnership. The EEOC right-to-sue letter arrived at the firm's office on October 6, and was signed for by a relative of the remaining partner. Because the remaining partner was out of town, neither attorney learned about the EEOC decision until October 10. The complaint was filed on January 6, ninety-two days after arrival of the right-to-sue letter. We held that the suit was not timely filed, concluding that "the 90-day period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant."[7]

Irwin argues that we should not apply the constructive notice rule of *Ringgold* to his Title VII action against the federal government. He notes the longer period in which to file suit against a private employer. Further,

[5] 796 F.2d 769 (5th Cir.1986).

[6] 42 U.S.C. § 2000e-5(f)(1).

[7] *Ringgold*, 796 F.2d at 770.

while the ninety-day period of § 2000e-5(f)(1) is subject to equitable tolling,[8] the thirty-day span allotted under § 2000e-16(c) operates as an absolute jurisdictional limit.[9] In Irwin's view, constructive notice would add an unnecessary burden to a federal employee's Title VII rights.

Our task, of course, is to discern congressional intent. Having found the constructive notice doctrine applicable under § 2000e-5(f)(1) in *Ringgold*, we see no reason to believe Congress intended a different result in suits against the government than in suits against private employers. We have adopted a "system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' "[10] This basic policy choice is reflected in Fed.R.Civ.P. 5(b), making service of papers on a party's attorney the normal procedure. Congress enacted § 2000e-16(c) against this background. We are persuaded that the sufficiency of notice to a person's lawyer is so ingrained that we should expect Congress to say so if it intends a different rule. Nor is the thirty-day time limit under this statute more burdensome than many other time limits within which attorneys must operate.

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[8] *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 592-93 n. 15 (5th Cir.1981).

[9] *Bell v. Veterans Administration Hosp.*, 826 F.2d 357, 360-61 (5th Cir.1987).

[10] *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. (11 Otto.) 320, 326, 25 L.Ed. 955 (1879))

Irwin also relies on our decision in *Cooper v. Lewis*,[11] where we determined that notice to an attorney would not be imputed to the employee for purposes of a fifteen-day time period governing appeals from an employing agency to the Civil Service Commission Appeals Review Board. The fifteen-day limit was not statutory, but rather was created by the agency pursuant to its rulemaking authority. We interpreted the regulation to require actual notice to the claimant as the triggering event. In doing so, we were persuaded that the regulation comfortably abided our charge to liberally construe the provisions of Title VII.

In *Cooper*, we relied on three cases from other circuits interpreting § 2000e-16(c), the statute now before us. In *Bell v. Brown*,[12] a divided panel of the D.C. Circuit read "receipt" in § 2000e-16(c) to mean receipt by the employee, relying on the principle of liberal construction of remedial statutes. It also rested its decision on judicial deference to administrative construction of the statute, arguing that the "Civil Service Commission's interpretations of that section have consistently reflected the theme that the 30-day period for suit is not set in motion until notice of the final administrative action is obtained by the affected employee, irrespective of when it might reach a representative."[13] The dissent emphasized that parties are generally deemed to have notice of facts known to their attorneys.[14]

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[11] 644 F.2d 1077 (5th Cir. Unit A May 1981).

[12] 557 F.2d 849 (D.C.Cir.1977).

[13] *Id.* at 854.

[14] *Id.* at 857-58 (Robb, J., dissenting).

In *Craig v. Department of Health, Education & Welfare,*[15] the Eighth Circuit followed *Bell,* giving the same two reasons for its decision. However, it carved out an exception where a certified letter is sent to a representative designated by the employee, addressed in accordance with the employee's specific directions, and the representative personally acknowledges receipt of the notice. In *Rea v. Middendorf,*[16] the Sixth Circuit relied on *Bell* to affirm dismissal of a Title VII complaint, reasoning that the thirty-day period began running when the employee received notice of the adverse administrative decision, and not from the later date when his attorney received notice.

In *Cooper,* we expressed approval for the holdings of *Bell, Craig* and *Rea* in dicta:

> [S]ince the Commission did not intend the fifteen-day time period established by Commission regulations to commence upon receipt of notice by the complaint's representative, and since that interpretation comports with the policy that the Act should be liberally construed in favor of those that it is designed to protect, we are compelled to hold that the constructive notice doctrine is inapplicable here. While the Sixth, Eighth, and D.C. Circuit cases dealt with the statutory thirty-day time period, *we find their reasoning applicable here and agree with their result.* Indeed, we find that result even more compelling here where the court is dealing with a Commission regulation that establishes an extremely short period within which an employee may appeal to the Review Board and that anticipates

[15] 581 F.2d 189 (8th Cir.1978).

[16] 587 F.2d 4 (6th Cir.1978).

> that notice to the employee – not his representative – will trigger the running of the limitation period. Therefore, we hold that in the present case, the fifteen-day time period established by Commission regulations for federal employees to appeal to the Civil Service Commission Appeals Review Board began to run when the employee received the notice.[17]

Irwin invites us to take the next step of turning *Cooper's* dicta into holding. We decline the invitation. Forced to choose between *Ringgold* and *Cooper,* we find *Ringgold* more analogous to our present inquiry. *Cooper,* after all, involved construction of a regulation adopted by the relevant administrative agency. Thus, *Cooper's* primary focus was upon the intent of the Civil Service Commission. Our task, as in *Ringgold,* is to determine Congressional intent without the assistance of a regulator's interpretive effort.

Further, when *Bell, Craig* and *Rea* were decided, regulatory authority under this statute rested with the Civil Service Commission. Those cases relied on CSC regulations, which specifically stated that the employee could file a civil action "[w]ithin thirty (30) calendar days of *his* receipt of notice of final action" taken by his agency or by the Commission on his complaint.[18] Since them, regulatory authority has been shifted to the Equal Employment Opportunity Commission.[19] While the EEOC adopted

[17] *Cooper,* 644 F.2d at 1085 (emphasis supplied).

[18] *See* 37 Fed.Reg. 25,699 (1972) (text of 5 C.F.R. § 713.281(a), (c) (emphasis supplied)); *Rea,* 587 F.2d at 5 (quoting 5 C.F.R. § 713.281(a)).

[19] *See* 43 Fed.Reg. 60,901 (1978).

many of the CSC's regulations verbatim, this particular regulation was soon modified by dropping the word "his" from in front of "receipt."[20] Thus, the current regulation does not specify whose receipt of notice triggers the thirty-day time clock for filing a civil action.[21] Without an authoritative administrative interpretation of the statute, much of the rationale for *Bell*, *Craig* and *Rea* disappears. *Cooper* also becomes less persuasive, since it involved interpretation of a CSC regulation, rather than its EEOC counterpart, and since it rested on *Bell*, *Craig* and *Rea* in reaching its result. Thus, we apply the constructive notice doctrine of *Ringgold*, and find that the district court lacked jurisdiction over Irwin's Title VII claim.

II

Irwin next asserts that the district court erred when it dismissed his claims under 42 U.S.C. §§ 1985 and 1986. The district court based its decision on *Brown v. General Services Administration*,[22] which held that Title VII provides the exclusive remedy for claims of employment discrimination filed against the federal government. Irwin admits the principle, but insists that he pled claims under §§ 1985 and 1986 which were sufficiently distinct from employment discrimination claims to avoid the bar

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[20] *See* 45 Fed.Reg. 24,133 (1980) (text of 29 C.F.R. § 1613.281(a), (c)).

[21] 29 C.F.R. § 1613.281.

[22] 425 U.S. 820, 835, 96 S.Ct. 1961, 1969, 48 L.Ed.2d 402 (1976).

of *Brown*. We need not decide the scope of *Brown*. To rely on § 1985, a plaintiff must plead the operative facts upon which his claim is based, more than conclusory allegations.[23] If Irwin intended to plead claims sufficiently distinct from the employment context to escape *Brown*, he has not done so with the required degree of specificity. Since a § 1985 conspiracy forms an integral part of a claim under § 1986,[24] Irwin's reliance on the latter statute is also undermined.

III

Irwin argues finally that the district court erred in dismissing his age discrimination complaint. We have previously outlined the two "avenues of relief" available to a plaintiff alleging age discrimination in federal employment:

> He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is adverse to him he may appeal to the Civil Service Commission [now the Equal Employment Opportunity Commission] for administrative review. After the administrative complaint has been filed with the Commission, a civil action then may be instituted. Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the Commission as long as such notice is given

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[23] *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir.1987).

[24] *See Hamilton v. Chaffin*, 506 F.2d 904, 913-14 (5th Cir.1975).

> "within one hundred and eighty days after the alleged unlawful practice occurred."[25]

The plaintiff must either "seek relief through one of the two avenues described or alternatively claim equitable grounds for not having so proceeded and must prove that the reasons he was prevented from proceeding can be blamed upon the employing agency."[26]

When a defendant makes a "factual attack" on the court's jurisdiction, the plaintiff must "prove the existence of subject-matter jurisdiction by a preponderance of the evidence."[27] An attack is "factual" rather than "facial" if the defendant "submits affidavits, testimony, or other evidentiary materials."[28] The plaintiff is obliged "to submit facts through some evidentiary method" to sustain his burden of proof.[29]

In this case, the government challenged the district court's subject matter jurisdiction over the age discrimination claim in its Amended Motion to Dismiss. The primary thrust of its argument was that exhaustion of remedies is a jurisdictional prerequisite, and that it should have been alleged in his complaint in district court. Appellees also argued, however, that "the evidence . . . submitted to the Court suggests that plaintiff never raised this issue with the EEOC." The government

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[25] *Paterson v. Weinberger*, 644 F.2d 521, 523-24 (5th Cir.1981) (citations omitted).

[26] *Id.* at 524.

[27] *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir.1986).

[28] *Paterson*, 644 F.2d at 523.

[29] *Id.*

attached Irwin's EEO Counseling Report, which did not mention claims based on age discrimination. The district court ordered the parties to submit evidence on the question of jurisdiction over the Title VII claim, but made no similar request with respect to the other jurisdictional attacks. In reply to the motion to dismiss the age discrimination claim, Irwin argued:

> Defendants next assert that Plaintiff failed to include age discrimination as an element in his administrative proceedings. Plaintiff, in seeking redress through the administrative routes, asserted all claims including those of age discrimination. That the Equal Employment Opportunity Commission in its decision did not directly address Plaintiff's age discrimination claim, is not binding, or should not be found to be binding upon the Plaintiff at this time. Plaintiff asserted through the EEO counsel all matters alleged in Plaintiff's complaint herein, including his age discrimination assertion.

Irwin offered no evidence to back up this claim. The district court treated the attack on its jurisdiction as factual, finding that appellant had neither filed a formal age discrimination complaint with his agency nor given notice of his intent to sue. The court also stated that Irwin offered no reason justifying his failure to give such notice. We affirm.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 89-5867

Shirley W. Irwin,

Petitioner

v.

Veterans Administration, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 20, 1990